



FH
[REDACTED]

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

Milwaukee Enrollment Services, Petitioner

DECISION

v.

[REDACTED], Respondent

FOF/147903

PRELIMINARY RECITALS

Pursuant to a petition filed March 11, 2013, under Wis. Admin. Code §HA 3.03, and see, 7 C.F.R. §273.16, to review a decision by the Milwaukee Enrollment Services to disqualify [REDACTED] from receiving FoodShare benefits (FS) for a period of one year, a hearing was held on May 02, 2013, at Milwaukee, Wisconsin.

The issue for determination is whether the respondent committed an Intentional Program Violation (IPV).

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

Department of Health Services
Division of Health Care Access and Accountability
1 West Wilson Street
Madison, Wisconsin 53703
By: Pamela Hazley

Milwaukee Enrollment Services
1220 W Vliet St
Milwaukee, WI 53205

Respondent:

[REDACTED]
[REDACTED]
[REDACTED]

ADMINISTRATIVE LAW JUDGE:

Kelly Cochrane
Division of Hearings and Appeals

FINDINGS OF FACT

1. Respondent (CARES # [REDACTED]) is a resident of Milwaukee County who received FS in Wisconsin during the time period of March, 2009 to February, 2013. Exhibit 1.

2. On October 7, 2011 respondent submitted a renewal for FS. Exhibit 3. Respondent listed the members of her household, which included her 21 year old daughter T.S. Respondent also listed T.S.'s employment and income with DSW.
3. On October 24, 2011 respondent provided verification to the agency that T.S.'s employment at DSW ended. See Exhibit 11.
4. On March 22, 2012 respondent submitted a six month report form for FS. Exhibit 5. Respondent listed the members of her household, which included her then 22 year old daughter T.S. The only earned income listed was respondent's. Exhibit 5.
5. On March 22, 2012 T.S. submitted three renewals for her own Medical Assistance case. Exhibit 5. T.S. listed the only earned income in the household as respondent's. Exhibit 5.
6. On March 26, 2012 T.S. submitted two renewals for her own Medical Assistance case. Exhibit 7. T.S. listed the only earned income in the household as respondent's. Exhibit 7.
7. On September 13, 2012 the agency received information that T.S. was receiving unemployment compensation. See Exhibit 8 and 11.
8. On September 24, 2012 respondent submitted a renewal for FS wherein she reported that T.S. was receiving unemployment compensation. See Exhibit 11.
9. On or about November 30, 2012 the agency received verification that T.S. had been working for Transitional Living Services from June 6, 2011 through July 26, 2012. See Exhibit 8b. The verification lists her job title, but shows no information as to her rate of pay or work hours. It lists her gross pay for her final month of employment as \$144.
10. On January 7, 2013 the agency issued a notice of decision to respondent stating that she had been overpaid FS in the amount of \$4350 for the time period of 10/7/11-August 31, 2012 (claim # [REDACTED]). Exhibit 9.
11. On March 11, 2013 the agency issued an Administrative Disqualification Hearing Notice to respondent. Exhibit 12. That is the subject of this decision.

DISCUSSION

An IPV is defined at 7 C.F.R. §273.16(c) as intentionally: making a false or misleading statement or misrepresenting; concealing or withholding facts; or committing any act that constitutes a violation of the Food Stamp Act, federal regulations or any Wisconsin statute relating to the use, presentation, transfer, acquisition, receipt or possession of food stamp coupons or an authorization to participate (ATP) card.

The Department 's written policy restates federal law, below:

3.14.1 IPV Disqualification

7 CFR 273.16

A person commits an Intentional Program Violation (IPV) when s/he intentionally:

1. makes a false or misleading statement, or misrepresents, conceals or withholds facts; or
2. commits any act that constitutes a violation of the Food Stamp Act, the Food Stamp Program Regulations, or any Wisconsin statute for the purpose of using, presenting, transferring, acquiring, receiving, possessing or trafficking of FoodShare benefits or QUEST cards.

An IPV may be determined by the following means:

1. Federal, state, or local court order,
2. Administrative Disqualification Hearing (ADH) decision,
3. Pre-charge or pretrial diversion agreement initiated by a local district attorney and signed by the FoodShare recipient in accordance with federal requirements, or

4. Waiver of the right to an ADH signed by the FoodShare recipient in accordance with federal requirements.

FoodShare Wisconsin Handbook, § 3.14.1.

Wisconsin statutes provide, in the parts relevant here, as follows:

- (2) No person may misstate or conceal facts in a food stamp program application or report of income, assets or household circumstances with intent to secure or continue to receive food stamp program benefits.
- (2m) No person may knowingly fail to report changes in income, assets or other facts as required under 7 USC2015(c)(1) or regulations issued under that provision.
- (3) No person may knowingly issue food coupons to a person who is not an eligible person or knowingly issue food coupons to an eligible person in excess of the amount for which the person's household is eligible.
- (4) No eligible person may knowingly transfer food coupons except to purchase food from a supplier or knowingly obtain food coupons or use food coupons for which the person's household is not eligible.
- (5) No supplier may knowingly obtain food coupons except as payment for food or knowingly obtain food coupons from a person who is not an eligible person.
- (6) No unauthorized person may knowingly obtain, possess, transfer or use food coupons.
- (7) No person may knowingly alter food coupons.

Wis. Stat. §§ 49.795(2-7).

The county agency may disqualify only the individual who either has been found to have committed the IPV or has signed a waiver or consent agreement, and not the entire household. If disqualified, an individual will be ineligible to participate in the FS program for one year for the first violation, two years for the second violation, and permanently for the third violation. However, any remaining household members must agree to make restitution within 30 days of the date of mailing a written demand letter, or their monthly allotment will be reduced. 7 C.F.R. §273.16(b).

In order for the county agency to establish that an FS recipient has committed an IPV, it has the burden to prove two separate elements by clear and convincing evidence. The recipient must have: 1) committed; and 2) intended to commit an intentional program violation per 7 C.F.R. §273.16(e)(6).

"Clear and convincing evidence" is an intermediate standard of proof which is more than the "preponderance of the evidence" used in most civil cases and less than the "beyond a reasonable doubt" standard used in criminal cases. It is used in civil cases where a higher standard is required because the outcome could result in serious social consequences for, or harsh effects on an individual. See 32A C.J.S., Evidence §1023. While the terminology for this intermediate standard of proof varies from state to state, it is clear that it is what is required by the FS regulations. See Jackson v. State, 546 So.2d 745 (Fla. App. 2 Dist. 1989).

There is no litmus test to show the trier of facts when properly admitted evidence is of a sufficient degree to be clear and convincing. In Smith v. Department of Health and Rehab. Serv., 522 So.2d 956 (Fla. App. 1 Dist. 1988), the court discussed this issue as it relates to a FS IPV:

In *Slomowitz v. Walker*, 429 So.2d 797, 800 (Fla. 4th. DCA 1983), the court held that: Clear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

Smith, 522 So.2d at 958. The Wisconsin Supreme Court viewed the various standards of proof as degrees of certitude. In *Kuehn v. Kuehn*, 11 Wis.2d 15 (1959), the court held that:

Defined in terms of quantity of proof, reasonable certitude or reasonable certainty in ordinary civil cases may be attained by or be based on a mere or fair preponderance of the evidence. Such certainty need not necessarily exclude the probability that the contrary conclusion may be true. In fraud cases it has been stated the preponderance of the evidence should be clear and satisfactory to indicate or sustain a greater degree of certitude. Such degree of certitude has also been defined as being produced by clear, satisfactory, and convincing evidence. Such evidence, however, need not eliminate a reasonable doubt that the alternative or opposite conclusion may be true. In criminal cases, while not normally stated in terms of preponderance, the necessary certitude is universally stated as being beyond a reasonable doubt.

Kuehn, 11 Wis.2d at 26. Thus, in order to find that an IPV was committed, the trier of fact must derive from the evidence, a firm conviction as to the existence of each of the two elements even though there may exist a reasonable doubt that the opposite is true.

What is needed to prove the first element, that an IPV as defined in 7 C.F.R. §273.16(c) was committed, is clear. In order to prove the second element, there must be clear and convincing evidence that the FS recipient intended to commit the IPV. The question of intent is generally one to be determined by the trier of fact. State v. Lossman, 118 Wis.2d 526 (1984). There is a general rule that a person is presumed to know and intend the probable and natural consequences of his or her own voluntary words or acts. See John F. Jelke Co. v. Beck, 208 Wis. 650 (1932); 31A C.J.S. Evidence §131. Intention is a subjective state of mind to be determined upon all the facts. Lecus v. American Mut. Ins. Co. of Boston, 81 Wis.2d 183 (1977). Thus, there must be clear and convincing evidence that the FS recipient knew that the act or omission was a violation of the FS Program but committed the violation anyway.

The respondent appeared at hearing to contest that she had any intention of defrauding the FS program. It was her testimony that she did not know that her daughter had the job at Transitional Living Services (TLS) and therefore could not have reported what she did not know. She cited troubles with her daughter at the time wherein they were not communicating. She also described that her daughter was home when respondent arrived home from her job, and therefore she was not aware of any unexplained absence from the home. The Case Comments show a history of respondent reporting timely. This is also evidenced through the September 24, 2012 renewal for FS wherein she reported that T.S. was receiving unemployment compensation. See Exhibit 11. I also add that respondent did not contest the overpayment listed in Finding of Fact #10. She agreed in the instant hearing that she understood an

overpayment had occurred because the TLS income had not been reported; however, she wanted to contest that there was any intentionality to cause it.

The evidence certainly shows that T.S. withheld information about her employment when she submitted her own renewals, but it does not show me that *respondent* knew about it. Further complicating the evidence here is the verification that showed T.S. had been working for TLS from June 6, 2011 through July 26, 2012. See Exhibit 8b. The verification lists her job title, but shows no information as to her rate of pay or work hours. It lists her gross pay for her final month of employment as \$144. This does not show me what her duties were, when she worked during the day or the week, or how to figure out a rate of pay.

In sum, I do not find that there is clear and convincing evidence that this respondent intended to commit the IPV. Accordingly, the agency cannot disqualify the respondent from the FoodShare program for one year.

CONCLUSIONS OF LAW

1. There is not clear and convincing evidence that this respondent intended to commit the IPV.
2. The agency cannot disqualify the respondent from the FoodShare program for one year under an IPV sanction.

THEREFORE, it is

ORDERED

The matter is remanded to the agency to rescind the Administrative Disqualification (IPV) from respondent's FS case. This action shall be taken within 10 days of the date of this decision.

REQUEST FOR A REHEARING

This is a final administrative decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a rehearing. You may also ask for a rehearing if you have found new evidence which would change the decision. Your request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

To ask for a rehearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST." Your request for a rehearing must be received no later than 20 days after the date of the decision. See also, 7 C.F.R. sec. 273.16(e)(4) for the specific time limits for claiming good cause for missing the scheduled hearing. Late requests cannot be granted.

The process for asking for a rehearing is in Wis. Stat. § 227.49. A copy of the statutes can be found at your local library or courthouse.

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be served and filed with the appropriate court no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

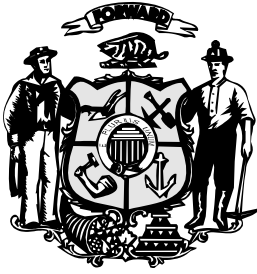
For purposes of appeal to circuit court, the Respondent in this matter is the Department of Health Services. After filing the appeal with the appropriate court, it must be served on the Secretary of that Department, either personally or by certified mail. The address of the Department is: 1 West Wilson

Street, Madison, Wisconsin 53703. A copy should also be sent to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for appeals to the Circuit Court is in Wis. Stat. §§ 227.52 and 227.53.

Given under my hand at the City of Milwaukee,
Wisconsin, this 16th day of May, 2013

\sKelly Cochrane
Administrative Law Judge
Division of Hearings and Appeals



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The preceding decision was sent to the following parties on May 16, 2013.

Milwaukee Enrollment Services
Public Assistance Collection Unit
Division of Health Care Access and Accountability